No. 89-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT[1]

1. (a) The greater part of Respondent's Argument is devoted to defending the Court of Appeals' ruling that the District Court lacked jurisdiction over Petitioner's claims for breach of contract. Br. Opp. at 5-11.[2] Re-

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[1] Throughout this Reply Brief, "Pet." will refer to the Petition for a Writ of Certiorari in this case; "App." will refer to the separately-bound Appendix to the Petition; "Br. Opp." will refer to the Brief in Opposition to the Petition filed by Respondent.

[2] Likewise, beside the point is Respondent's challenge to the District Court's decision on the merits. Br. Opp. 2-3. Any such matters will, of course, be open to Respondent if the District Court's jurisdiction over the fraud claim is sustained on certiorari.

spondent takes this course although, as it says, "LAK's statement of the question presented references only its tort claim for fraud * * *, and under Rule 21.1(a) of the Rules of this Court, that is the only issue properly presented." *Id.* 5-6. In thus concentrating its fire on the breach-of-contract issue, although it is not presented here, Respondent assumes that the same constitutional standard applies with respect to jurisdiction over a defendant on a claim for intentional tort. See, *e.g.*, Br. Opp. 14: "For the same reasons that the court of appeals was correct to find no personal jurisdiction over the contract claim, there was no jurisdiction over the tort claim, which was based on precisely the same conduct." This approach emulates that of the court below (see *id.* 3: "Drawing no distinctions between the contract claim and the fraud claim, the court of appeals held * * *.") It is, however, fundamentally inconsistent with the decisions of this Court.

Because "an individual's contract with an out-of-state party alone [cannot] *automatically* establish sufficient minimum contacts in the other party's home forum", *Burger King* v. *Rudzewicz*, 471 U.S. 462, 478 (1985) (emphasis added), the Court of Appeals' dismissal of the breach-of-contract claim is too fact-driven to qualify for certiorari.[3] In sharp contrast, however, is the constitutional standard with respect to intentional torts, for the rule in such cases in that the defendant is subject to suit in the State of plaintiff's residence if the defendant knows he would be injured there. *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984); *Calder* v. *Jones*, 465 U.S.

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[3] It is only for this reason that the Petition did not seek review of that determination. We readily agree that we are precluded from further litigating the contract claims, but Respondent errs in contending that Petitioner has thereby conceded the *correctness* of their dismissal. Br. Opp. 5-6, 11.

783, 788-89 (1984). See Pet. 8-10. The Court of Appeals' holding to the contrary therefore raises a pure question of federal law which merits review.[4]

(b) When Respondent finally addresses the issue as to which certiorari is sought, it observes that "even in tort cases, the defendants must have directed their actions toward the forum state and intended the brunt of the injury to be felt in [the forum state]." Br. Opp. 13, quoting *Hugel* v. *McNell*, 886 F.2d 1, 5 (1st Cir. 1989). We agree. See Pet. 11-13. In *Hugel*, the Court of Appeals captured the essential point:

> The knowledge that the major impact of the injury would be felt in the forum State constitutes a purposeful contact or substantial connection whereby the intentional tortfeasor could reasonably expect to be haled into the forum State's courts to defend his actions. [886 F.2d at 4.]

Both in its articulation of the constitutional standard and in sustaining the plaintiff's residence jurisdiction over the nonresident tortfeasor, the First Circuit's decision in *Hugel* directly conflicts with that of the Court of Appeals in this case. The reason for this conflict is, of course,

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[4] We note briefly that two points made by Respondent further illustrate the substantive differences between these constitutional standards.

1) Whereas the fact that "the plaintiff happens to be a resident of the forum" is insufficient to justify jurisdiction of a contract claim (Br. Opp. 7), a defendant who injures the plaintiff at his residence by an intentional tort does have a constitutionally sufficient contact with that jurisdiction. See *Calder*, 465 U.S. at 789-90 (1984), quoted at Pet. 9-10.

2) Conversely, although the existence or nonexistence of a long-term business relationship is a factor to which the Court attached great significance with respect to contract actions in *Burger King*, 471 U.S. at 479-80 (see also Br. Opp. 9-10), it is unnecessary for jurisdiction over a claim for an intentional tort, which is ordinarily a "one-shot operation" (*id.* 10).

that the First Circuit in *Hugel* followed *Calder* (*id.*), whereas the court below failed to do so.

As we showed at Pet. 11-13, the Court of Appeals misunderstood the requirement that the defendant has directed its attention to the forum state, and consequently seized on irrelevancies. See App. 18-19, quoted at Pet. 12; App. 20, quoted at Br. Opp. 4.[5] Respondent does likewise, asserting: "From the perspective of the Indiana partnership which accepted an unsolicited offer to sell a piece of property in Florida, the buyer's residence in Michigan was entirely fortuitous." Br. Opp. 10. This argument misapplies the "fortuity" concept as it has been explained by this Court. Whatever may have been Respondent's "perspective" before it entered into negotiations with Beznos Realty, once it did so knowing that Beznos was a Michigan entity it was entirely foreseeable—indeed, inevitable—that any fraud committed on Beznos would have its impact in Michigan.[6] Thus, Respondent's contacts with the Michigan forum "proximately result[ed] from actions by the defendant *himself*." *Burger King*, 471 U.S. 475, emphasis in original. More fundamentally, the element of intent, with knowledge that tortious injury will be inflicted on the plaintiff at his residence, eliminates any element of "fortuity;" this differentiates products liability cases like *World-Wide Volkswagen Corp.* v.

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[5] Respondent is understandably embarrassed by the Court of Appeals' reliance on the circumstance that the contract between the parties here was last signed in Indianapolis and did not become binding until then. See App. 27, quoted at Pet. 12. But there simply is no basis in that Court's opinion for Respondent's treatment of this portion of the Sixth Circuit's opinion as "*dictum*," and as a mere interpretation of the Michigan long-arm statute. Br. Opp. 13-14, n.9.

[6] By contrast, Respondent had no way of knowing that Beznos Realty personnel would be in "Canada, Mexico, Texas, Arizona and California." Br. Opp. 4. Therefore, the limits on jurisdiction enunciated by this Court would have precluded suit against Respondent in those jurisdictions.

Woodson, 444 U.S. 286, 295-98 (1980), where the defendant did not expect or intend that its negligence would cause injury in the forum state, although such injury was "foreseeable." See *Hugel*, quoted at p. 3, *supra*.

The short of the matter is that the Court of Appeals and Respondent have failed to appreciate that the "purposeful availment" test (and its other formulations), are firmly rooted in "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). See Pet. 8, 13. Respondent has not even asserted, let alone demonstrated, that it was "unfair" or contrary to substantial justice for the federal court in Michigan to exercise jurisdiction over Respondent on Petitioner's claim for intentional fraud.

2. Respondent does not deny that the question presented by this Petition is one which arises with great frequency in the lower state and federal courts. Indeed, it is reasonable to assume that the array of appellate decisions at Br. Opp. 12-13, and especially n.9, is but the tip of the iceberg. We submit that a decision like that of the court below which is inconsistent with this Court's precedents will inevitably create confusion and invite unnecessary jurisdictional litigation and should not be permitted to stand. Pet. 13.

Proceeding from its assumption that there is a "judicially imposed requirement that each and every question of personal jurisdiction over a non-resident defendant be decided 'on its own facts'" (App. 28, n.7), the court below said: "More sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it—and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court." *Id.* Thus, even if, notwithstanding what we (and the First Circuit in *Hugel, supra*) consider to be the clear import of *Keeton*

and *Calder*, this Court has not already established that the State of a plaintiff's residence has jurisdiction to remedy an intentional tort which injures him there, certiorari should be granted to resolve the issue for the guidance of the lower courts.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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